STATE OF MICHIGAN
IN THE SUPREME COURT

Supreme Court No. 154085

In re REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2016 PA 249.

The appeal involves a question whether a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

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BRIEF OF ATTORNEY GENERAL ARGUING THAT (1) THIS COURT SHOULD DECLINE THE GOVERNOR'S REQUEST AND (2) 2016 PA 249 IS UNCONSTITUTIONAL

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STATEMENT OF JURISDICTION

These questions are subject to this Court's review under Michigan's constitution and under its court rules. Const 1963, art 3, § 8; MCR 7.308(B).

STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court should exercise its discretion to grant the Governor's request to issue an advisory opinion.

2. Whether the appropriation to nonpublic schools authorized by Section 152b of 2016 PA 249 would violate article 8, § 2 of Michigan's constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 8, § 2 provides in pertinent part:

> No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.

Public Act 249 of 2016

> Sec. 152b. (1) From the general fund money appropriated under section 11,1 there is allocated an amount not to exceed $2,500,000.00 for 2016-2017 to reimburse costs incurred by nonpublic schools as identified in the nonpublic school mandate report published by the department on November 25, 2014 and under subsection (2).
>
> (2) By January 1, 2017, the department shall publish a form containing the requirements identified in the report under subsection (1). The department shall include other requirements on the form that were enacted into law after publication of the report. The form shall be posted on the department's website in electronic form.
>
> (3) By June 15, 2017, a nonpublic school seeking reimbursement under subsection (1) of costs incurred during the 2016-2017 school year shall submit the form described in subsection (2) to the department. This section does not require a nonpublic school to submit a form described in subsection (2). A nonpublic school is not eligible for reimbursement under this section unless the nonpublic school submits the form described in subsection (2) in a timely manner.
>
> (4) By August 15, 2017, the department shall distribute funds to nonpublic schools that submit a completed form described under subsection (2) in a timely manner. The superintendent shall determine the amount of funds to be paid to each nonpublic school in an amount that does not exceed the nonpublic school's actual cost to comply with requirements under subsections (1) and (2). The superintendent shall calculate a nonpublic school's actual cost in accordance with this section.

(5) If the funds allocated under this section are insufficient to fully fund payments as otherwise calculated under this section, the department shall distribute funds under this section on a prorated or other equitable basis as determined by the superintendent.

(6) The department has the authority to review the records of a nonpublic school submitting a form described in subsection (2) only for the limited purpose of verifying the nonpublic school's compliance with this section. If a nonpublic school does not allow the department to review records under this subsection for this limited purpose, the nonpublic school is not eligible for reimbursement under this section.

(7) The funds appropriated under this section are for purposes related to education, are considered to be incidental to the operation of a nonpublic school, are noninstructional in character, and are intended for the public purpose of ensuring the health, safety, and welfare of the children in nonpublic schools and to reimburse nonpublic schools for costs described in this section.

(8) Funds allocated under this section are not intended to aid or maintain any nonpublic school, support the attendance of any student at a nonpublic school, employ any person at a nonpublic school, support the attendance of any student at any location where instruction is offered to a nonpublic school student, or support the employment of any person at any location where instruction is offered to a nonpublic school student.

(9) For purposes of this section, "actual cost" means the hourly wage for the employee or employees performing the reported task or tasks and is to be calculated in accordance with the form published by the department under subsection (2), which shall include a detailed itemization of cost. The nonpublic school shall not charge more than the hourly wage of its lowest-paid employee capable of performing the reported task regardless of whether that individual is available and regardless of who actually performs the reported task. Labor costs under this subsection shall be estimated and charged in increments of 15 minutes or more, with all partial time increments rounded down. When calculating costs under subsection (4), fee components shall be itemized in a manner that expresses both the hourly wage and the number of hours charged. The nonpublic school may not charge any applicable labor charge amount to cover or partially cover the cost of health or fringe benefits. A nonpublic school shall not charge any overtime wages in the calculation of labor costs.

INTRODUCTION

This Court has asked the Attorney General to brief two legal issues, one addressing whether this Court should issue an advisory opinion, and the second addressing the constitutionality of Public Act 249 of 2016 (which becomes effective October 1, 2016). This brief argues that this Court should decline the request for an advisory opinion and also argues that the Act is unconstitutional because it violates Michigan's constitution under article 8, § 2. There are two primary points in this brief.

First, while the advisory opinion process ordinarily operates in a helpful way to provide guidance to the bench and bar, this case is uniquely unsuited to that process. The question presented may require this Court to revisit its decision in *Traverse City School District v Attorney General,* 384 Mich 390 (1971). As this brief argues, that decision did not adhere to the common understanding of the Constitution's plain language, wrongly eschewing a "literal perspective" on the meaning of the Parochiaid Amendment in 1971. Thus, it is possible that this Court would have to determine whether to overrule some of the analysis in *Traverse City*. But it is black-letter law that an advisory opinion is not binding on the lower courts, and so a subsequent court would be compelled as matter of law to *disregard* this Court's advisory opinion and continue to follow *Traverse City*. The advisory opinion process does not work well when the Court must consider whether to overturn a key precedent. This is a case where the matter should be litigated. This Court should decline to issue an advisory opinion here.

Second, the statute is unconstitutional. Under *Traverse City,* this statute violates article 8, § 2 by contradicting one of the basic prohibitions identified in *Traverse City*, which "prohibits state funding of purchased educational services in the nonpublic school where the hiring and control is in the hands of the nonpublic school." Such is the case here. Of the more than 40 nonpublic mandates, the statute would directly fund the private schools for all of them, placing the full control over the service in the private school. This is a threshold point for this Court's analysis in *Traverse City*, and it poses a hurdle that the statute cannot overcome. Insofar as the supporters of the statute rely on distinctions of "incidental" and "non-instructional" services identified in *Traverse City*, these categories cannot shield the statute's main thrust, which directly pays the private schools for educational services that they control. The statute cannot survive *Traverse City.*

If the Court determines that Public Act 249 is constitutional under *Traverse City*, then the decision must fall and be overruled. The plain language of Michigan's constitution is both sweeping and categorical, as noted in the Attorney General's formal opinion released in 1970. The distinctions created by this Court, with virtually no textual support, are invalid and cannot be invoked to blunt the obvious significance of the Parochiaid Amendment's plain meaning, which bars this statute. The principles of stare decisis would require the overruling of *Traverse City* – if that issue is joined – because the decision strays so far from the constitution's text. And, contrary to *Traverse City,* there is nothing unconstitutional in refusing to provide financial support to aid private schools. Public Act 249 of 2016 is unconstitutional.

That being said, this Court need not revisit *Traverse City* here because Public Act 249 is unconstitutional under the reasoning of that decision. Related to the doctrine of constitutional avoidance, this Court should rule on narrow grounds and avoid overruling precedent where that action is unnecessary to the resolution of the case. Public Act 249 cannot survive the parameters of *Traverse City* before even reaching the more limiting language of the Parochiaid Amendment itself. While it is a rogue in the law, the *Traverse City* opinion should remain – receive a reprieve – because it provides a proper resolution to the legal issue.

STATEMENT OF FACTS AND PROCEEDINGS

The Parochiaid Amendment

The "Parochiaid Amendment," Const 1963, art 8, § 2, limits the aid that can be provided to nonpublic schools with public funds. In the late 1960s, state legislators began introducing bills "designed to give tax relief to tuition paying parents of children attending private schools." *Traverse City School District v Attorney General,* 384 Mich 390, 406 n 2 (1971). Such aid came to be known as "parochiaid." Foreseeing enactment of parochiaid, the Governor included $22 million in his estimated state budget for 1970 to fund the proposed scheme. *Id.*

Parochiaid "generated heated controversy both inside and outside the legislature." *Id.* In response, concerned citizens petitioned to place what was called Proposal C (now known as the Parochiaid Amendment) on the ballot for the general election in November 1970. *Id.* By vote, the People of this State adopted the amendment. *Id.* In full, the amendment as enacted provides:

Nonpublic schools, prohibited aid.

> No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school. [Const 1963, art 8, § 2.]

Public Act 249

In 2016, the Legislature enacted Public Act 249, appropriating funds for Michigan schools. Effective October 1, 2016, the Act includes a section appropriating $2.5 million in public funds to reimburse nonpublic schools specifically for their cost of complying with certain state mandates regarding curriculum, teacher and counselor certification, and safety and administrative measures, among other mandates. MCL 388.1752b. The mandates eligible for reimbursement are listed in the nonpublic mandate report of November 25, 2014, prepared by the Department of Education, plus additional mandates enacted after the date of the report that affect nonpublic schools. MCL 388.1752b(1)–(2).

Under the statute, the Department of Education is to prepare a form by January 1, 2017 that outlines the mandates eligible for reimbursement. MCL 388.1752b(2). A nonpublic school seeking reimbursement of compliance costs incurred during the 2016–2017 school year must complete and submit the form to the Department by June 15, 2017. MCL 388.1752b(3).

The superintendent shall then determine the amount of funds to be paid to each nonpublic school, and the Department shall distribute those public funds to the nonpublic school by August 15, 2017. MCL 388.1752b(4). Reimbursement is limited to the "actual cost" of compliance, which is defined as the hourly wage for the lowest-paid employee capable of performing the mandated task, not including overtime or health or fringe benefits. MCL 388.1752b(9).

STANDARD OF REVIEW

This Court reviews de novo questions of constitutional and statutory interpretation. *Coalition of State Employee Unions v State,* 498 Mich 312, 322 (2015).

ARGUMENT

I. The Court should decline the Governor's request to issue an advisory opinion.

The Constitution provides for an advisory opinion process under article 3, § 8, but it does not require this Court to grant review. There are two separate considerations that counsel against issuing an advisory opinion here. First, the Court would not be able to revisit *Traverse City* in a meaningful way, because any decision overruling it would be advisory only. A decision to overrule it would not advance the law and would leave the lower courts in an untenable position. The Court should not take the case where one significant possible outcome would only create confusion. Second, significant questions remain as to what, exactly, is reimbursable under the Act as a cost of compliance. In January 2017, the Department of Education will publish a form identifying the required mandates for which nonpublic schools can seek reimbursement. The factual predicate of the question before this Court is thus not entirely known.

A. To the extent it is inconsistent with *Traverse City*, an advisory opinion would promote confusion, not clarity, in the law.

The section providing for advisory opinions first appeared in Michigan's 1963 constitution. This Court has described it as an "innovation" that should be invoked only "sparing[ly]." *In re request for Advisory Opinion regarding Constitutionality of 1977 PA 108*, 402 Mich 83, 86 (1977). Article 3, § 8 provides in full:

> Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date. [Const 1963, art 3, § 8.]

If the Court grants the request to issue a decision, the opinion it renders is advisory in nature, because it does not "constitute a decision of the Court" and is "not precedentially binding," at least not "in the same sense" as this Court's other decisions. See *In re Requests of Governor and Senate on Constitutionality of Act No. 294 of Public Acts of 1972*, 389 Mich 441, 460 n 1 (1973). The Court has gone so far as to indicate that in rendering such an opinion, the justices are not making a judicial determination but rather are acting as "constitutional advisers" to the departments of the government. *Cassidy v McGovern*, 415 Mich 483, 497 (1982) (citing *Anway v Grand Rapids Railway Co*, 211 Mich 592, 603–604 (1920)),[1] overruled on other grounds, *DiFranco v Pickard*, 427 Mich 32 (1986). Thus, an advisory opinion does not bind the lower courts.

As a result, the lower courts that have addressed advisory opinions from this Court have identified them as "persuasive" and noted that they are not binding. See, e.g., *AFT Michigan v Michigan*, 303 Mich App 651, 668 (2014). In this way, this advisory opinion request raises the specter of this Court reviewing *Traverse City* with the knowledge that if it purported to overrule the decision, the lower courts would still be bound to follow it. This would create confusion, not clarity.

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[1] In fact, Justice Black in a concurrence even described these opinions as "non-adjudicatory" because they are "not a judicial proceeding at all." *In re Advisory Opinion on Constitutionality of Act No 261 of Public Acts of 1966*, 379 Mich 55, 66–67 (1967). This Court seemed to adopt this conclusion in a special order denying a request for an advisory opinion. *Request for Advisory Opinion on Constitutionality of 1978 PA 33*, 402 Mich 968 (1978) (special order) ("[An advisory opinion] represents only the opinions of the parties signatory framed in a factual void."). See also *In re Advisory Opinion on Constitutionality of 1979 PA 57*, 407 Mich 60, 66 n 6 (1979) (same).

The claim that the *Traverse City* opinion was wrongly decided and should be overruled is a substantial one. See Argument II.C, pp 22–36. The opinion departs significantly from the plain text, creating a rift between the apparent meaning of the Parochiaid Amendment and its applied meaning as interpreted by this Court in 1971. It reflects the same basic errors that have served as the basis in the past for this Court to overrule other important decisions that failed to honor the language at issue. See *Rowland v Rowland,* 477 Mich 197, 228 n 9 (2007) (Markman, J., concurring) (listing 40 cases overturned by the Supreme Court from 2000 to 2007).

The most obvious departure from textualism is the introduction of distinctions not found in the amendment's language, most notably the limitation on the breadth of the amendment for effects that are only "incidental" to the aiding of private schools or to the education of private school children. *Traverse City,* 384 Mich at 414 ("shared time instruction provides only *incidental* aid"); *id.* at 419 ("auxiliary services are general health and welfare measures [that] have only an *incidental* relation to the instruction of private school children") (emphases added). In contrast, the Attorney General opinion issued on November 3, 1970 provided a straight-forward, natural reading of the amendment without attempts to blunt its apparent significance. See OAG, 1971-1972, No. 4715, pp 183–187 (November 3, 1970). Most tellingly, the Court characterized this understanding of the amendment as a "literal perspective," *Traverse City*, 384 Mich at 430, which can only be fairly understood to mean the plain meaning of the amendment.

Consequently, in entertaining this request for an advisory opinion, this Court would face a conundrum. In the face of litigation arising out of a particular set of facts, the Court of Appeals would be left applying *Traverse City* even if overruled, since that case would remain binding under the doctrine of stare decisis. This very paradox was faced by the Court of Appeals previously. See *Nalbandian v Progressive Michigan Insurance Co*, 267 Mich App 7, 17 (2005).

In *Nalbandian*, the Court of Appeals noted that one of the parties relied on one of this Court's advisory opinions, but that it was bound to follow the earlier decision of this Court – not the advisory opinion – if conflicting:

> [W]e might find [*Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 517–518 (1973)] to be persuasive, but only inasmuch as it does not contravene binding authority. With respect to the arguments plaintiffs would draw from *Advisory Opinion*, we do not find them to be persuasive; in many respects, it ignores or contravenes principles announced in [*Alan v Wayne Co*, 388 Mich 210 (1972)], decided just a year earlier.
>
> For example, *Advisory Opinion* found "particularly pertinent" practical concerns raised by Justice Cooley regarding the extensive reenactment and publication requirements that would result from a broad interpretation of Const. 1963, art. 4, § 25. However, the *Alan* Court had considered Justice Cooley's concerns as well and, quite directly and cogently, found them to be unfounded in light of technological advances that had occurred since 1865. **To the extent that, in this regard or others, *Advisory Opinion* contravenes *Alan*, we must, of course, follow *Alan*.** [*Nalbandian,* 267 Mich App at 17 (citations omitted) (emphasis added).]

In other words, the Court of Appeals continued to apply the prior precedent even if inconsistent with the advisory opinion. Thus, the advisory opinion did not play any significant role in the court's decision.

In such a circumstance as *Nalbandian* and as may occur here, the advisory opinion does not achieve its purpose of providing guidance to the bench and bar because the parties and the government will not really know what to expect after the decision is rendered. Of the approximately 40 advisory opinions that this Court has rendered since 1963, it appears that only one has purported to overrule a prior precedent. See *Advisory Opinion on Constitutionality of 1978 PA 426 (Enrolled House Bill 4407)*, 403 Mich 631, 646 (1978), overruling *Kelley v Secretary of State*, 149 Mich 343 (1907) to the extent it held to the contrary. And the decision there that was overruled has not been cited in Michigan since.

As a consequence, this Court should exercise its discretion and decline to grant the request for an advisory opinion. The posture of the case makes it a poor one to "depart[] from the historic judicial scheme" that uses adversarial proceedings to allow for the development of the law. See *In Request for Advisory Opinion on Constitutionality of 1979 PA 57*, 407 Mich 60, 66 n 6 (1979). The Court may well then have the chance to address these important questions without the inherent limitations of the advisory opinion process.

B. An advisory opinion is premature because there will be greater clarity in January 2017 regarding what portion of mandate compliance is reimbursable as an "actual cost" of compliance.

As a second reason to decline the request, there remain outstanding factual and procedural questions that make the resolution of the issues better for adversarial litigation.

Significantly, Public Act 249 creates a series of deadlines for action necessary before the reimbursement of costs may occur: the creation of the form for reporting (January 1, 2017), the submission of the costs (June 15, 2017), and the distribution of the reimbursements (August 15, 2017). MCL 388.1752b(2)–(4). The nonpublic mandate report identifies 45 separate mandates that must be met by the private schools, see Exhibit B of the Governor's request, but many of these do not appear to be mandates at all, and it is not yet clear what costs will be reimbursable.

Indeed, one of the weakness of the *Traverse City* decision, issued as a declaratory judgment on a stipulated record, was its lack of factual development. In the first question addressed, two of the predicate questions were answered as "not necessarily" because the legal answers were dependent on further factual development, requiring the Court to provide the caveat that "special circumstances not considered above may create unconstitutional entanglements." 384 Mich at 410, 417. This very same consideration counsels against issuing an advisory opinion where the Court would be forced to "hypothesize" about the true nature and cost of the factual claims. *In re Advisory Opinion of 1979 PA 57*, 407 Mich at 66.

There is no reason to take the case now when a real controversy will ordinarily enable the parties to develop the record so that the nature of the mandates at issue, their cost, and the significance to the private school will be clear. As in other cases, this Court should await an appeal that arises out of "a factual setting." *In re Advisory Opinion of 1977 PA 108*, 402 Mich at 437. This Court should deny the request for an advisory opinion.

II. The Parochiaid Amendment prohibits Public Act 249's appropriation for nonpublic schools because it directly aids the private schools.

Public Act 249's appropriation for nonpublic schools is unconstitutional under the Parochiaid Amendment, Const 1963, art 8, § 2, as this Court interpreted the amendment in *Traverse City*, because it gives public money directly to the nonpublic schools where they have control over these services. Should this Court hold that the Act is permissible under *Traverse City*, however, *Traverse City* should be overruled as contrary to the plain text of the Parochiaid Amendment.

A. Public Act 249 is unconstitutional under the Parochiaid Amendment as this Court interpreted it in *Traverse City*.

Public Act 249's appropriation of public funds to aid nonpublic schools violates the Parochiaid Amendment, both under its plain text and as this Court has interpreted the amendment in *Traverse City*. In that case, this Court addressed the effect of the newly adopted Parochiaid Amendment on various state programs involving nonpublic schools, most notably shared time[2] and auxiliary services[3] for nonpublic school students. *Traverse City* remains the seminal decision.

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[2] "[S]hared time is an operation whereby the public school district makes available courses in its general curriculum to both public and nonpublic school students normally on the premises of the public school." *Traverse City*, 384 Mich at 411 n 3. Since 1971, shared time has been expanded to include instruction provided by a district at a nonpublic school site. See MCL 388.1766b(2).

[3] Auxiliary services at the time included "health and nursing services and examinations; street crossing guards services; national defense education act testing services; speech correction services; visiting teacher services for delinquent and disturbed children; school diagnostician services for all mentally handicapped children; teacher counsellor services for physically handicapped children; teacher consultant services for mentally handicapped or emotionally disturbed children; remedial reading; and such other services as may be determined by the legislature." *Traverse City*, 384 Mich at 417–418. See also MCL 380.1296 (current definition).

While the opinion is lengthy and involved, the Court focused on a small number of recurring distinctions to decide the circumstances under which shared time and auxiliary-service programs among others were permissible public aid to nonpublic schools under the Parochiaid Amendment. The Court first noted that the Parochiaid Amendment contains "five prohibitions":

> 1. No public money 'to aid or maintain' a nonpublic school;
>
> 2. No public money 'to support the attendance of any student' at a nonpublic school;
>
> 3. No public money to employ any one at a nonpublic school;
>
> 4. No public money to support the attendance of any student at any location where instruction is offered to a nonpublic school student[;]
>
> 5. No public money to support the employment of any person at any location where instruction is offered to a nonpublic school student. [*Traverse City*, 384 Mich at 411.]

Recognizing that "[t]he plain meaning" of the Parochiaid Amendment would withhold public money from public schools that host nonpublic school students for shared time programs, the Court concluded that such a result would contravene the federal constitution; it accordingly struck Prohibitions 4 and 5, above by invalidating the language of "or at any location or institution where instruction is offered in whole or in part to such nonpublic school students." *Id.* at 414.

1. Whether aid to a nonpublic school is for the purpose of education or health and safety, *Traverse City* prohibits the direct provision of funding to the private schools where they maintain control over the service.

With respect to the remaining three prohibitions, the Court "refused to adopt a strict no benefits, primary or incidental rule." *Id.* at 413 (citation and internal quotations omitted). Instead, in examining and upholding shared time, which inherently involves the education and instruction of students, the Court focused on three main distinctions between that program and prohibited parochiaid. A fair reading shows that the public school's *control* was a necessary element for constitutionality.

First, it mattered that the public money was going to the public school – enough to list that point first. The Court explained that "[s]hared time differs from parochiaid" because under parochiaid "the public funds are paid to a private agency whereas under shared time they are paid to a public agency." *Id.* at 413.

Second, it mattered that the public school had control over decision-making and hiring: "parochiaid permitted the private school to choose and to control a lay teacher where[as] under shared time the public school district chooses and controls the teacher." *Id.*

Third, it mattered that that the public school determined what subjects were offered to nonpublic students: "parochiaid permitted the private school to choose the subjects to be taught, so long as they are secular, whereas shared time means the public school system prescribes the public school subjects." *Id.* at 413–414. The analysis was predicated on the public school's control of the process.

The Court cautioned that "[t]hese differences in control are legally significant." *Id.* It emphasized that parochiaid impermissibly provided "public monies *for* participating *nonpublic school units* to pay a portion of the *salaries* of private lay teachers of secular *nonpublic* school courses in the *nonpublic* school for *nonpublic* school students." *Id.* at 413 (emphasis added). In contrast, "shared time provides public monies *for local public school districts* to use *to hire public school teachers* to teach *public* school courses in public or nonpublic schools to *public* or *public* and nonpublic school students." *Id.* (emphasis added). The Court again emphasized that, "[o]bviously, a shared time program offered on the premises of the public school is *under the complete control of the public school district*"; under such circumstances, the shared time program "provides only incidental aid, if any" to the nonpublic school. *Id.* at 413–414, 416 (emphasis added).

To drive home the importance of public control, the Court required that shared time held on the premises of a nonpublic school "can be provided . . . only under conditions appropriate for a public school":

> [T]he ultimate *and immediate control* of the *subject matter*, *the personnel*, and *premises* ***must*** be under the public school system authorities[.] [*Id.* at 415 (emphasis added).]

Again, under these conditions of control, the shared time at a nonpublic school provides only "incidental aid" to the nonpublic school." *Id.* at 416. Further, "*under such conditions of control as a public school*," shared time at the nonpublic school does not "support . . . the employment of any person at any such nonpublic school." *Id.* (emphasis added). The concept of control is essential to the analysis.

Thus, control must remain in public hands for the shared time program that occurred on the premises of the private school to survive the amendment. The Court explained that "[t]his *conforms to our 'control' construction of the amendment* and the purposes (see Part VII) for which it was adopted." *Id.* (emphasis added).

This same principle undergirded the analysis of the constitutionality of auxiliary services, like crossing guards and driver education, for nonpublic school students. The Court held that the services were "general health and safety measures," as a kind of "special educational service," and found they "only incidentally involved" educating private school children." *Id.* at 418, 419. In so reasoning, the Court expressly evaluated the concepts of control and who receives the funds:

> Consequently, the prohibitions of Proposal C which *are keyed into prohibiting the passage of public funds into private school hands* for purposes of running the private school operation are not applicable to auxiliary services which only incidentally involve the operation of educating private school children." [*Id.* at 419–420 (emphasis added).]

The Court highlighted that private schools "exercise no control over" auxiliary services: "They are *performed by public employees under the exclusive direction of public authorities* and are given to private school children by statutory direction, not by an administrative order from a private school." *Id.* at 420 (emphasis added).

While the Court did state that these services had only an "incidental relation" to the instruction of private school children, *id.* at 419, the Court nonetheless held that the Parochiaid Amendment prohibited funding of services "where the hiring and control is in the hands of the non-public school." *Id.* at 435. The significance is unmistakable that the auxiliary services at issue remained under the exclusive control of the public schools. Again, control is essential to the analysis.

Five years later, this Court restated the same point about control. *Traverse City* "concluded that shared time programs – *if properly controlled by the public school system* – and auxiliary services such as health care and remedial reading programs *could be provided to* private schools consonant with the mandate of Proposal C." *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, 48 (1975) (emphasis added) (finding the provision of textbooks and supplies to the private schools would violate Michigan's constitution). In that same opinion, however, Justice Swainson writing a concurrence joined by three other justices indicated that a "proper interpretation" of *Traverse City* permitted aid to the private schools if only "incidental," and not "primary," to their support and maintenance, without reference to the question of control. *Id.* at 48 n 2. Insofar as this point suggests that direct funding to the private schools is permissible even if controlled by them, the decision is not binding (as an advisory opinion) and does not follow the full analysis of *Traverse City*.

2. Several of the mandates reimbursed under Public Act 249 relate to education and instruction and violate *Traverse City*'s prohibitions against giving control and money directly to the private schools.

To start, several of the mandates for which nonpublic schools will directly receive public funds relate to educational or instructional matters over which the private school retains control. Indeed, the statute itself expressly indicates that "[t]he funds appropriated under this section are *for purposes related to education*[.]" MCL 388.1752b(7) (emphasis added).

One of the most straight-forward examples of the way Public Act 249 violates the Parochiaid Amendment is that it provides public money directly to a private school to cover its costs of teaching government classes. Exhibit B, Nonpublic Mandate Report, MCL 380.1166. Under MCL 380.1166(1), in all nonpublic schools "regular courses of instruction shall be given in the constitution of the United States, in the constitution of Michigan, and in the history and present form of government of the United States, Michigan, and its political subdivisions." The statute further mandates that a high school "require a 1-semester course of study of 5 periods per week in civics," which must "include the form and functions of the federal, state, and local governments and shall stress the rights and responsibilities of citizens," which is a requirement for graduation. MCL 380.1166(2).

This mandate plainly relates to education and instruction by teachers employed and controlled by the private school. Moreover, the private school directly receives public funds to comply with the instructional mandate, which includes "the hourly wage for the employee or employees performing the reported task," MCL 388.1752b(9), i.e., teaching the class. And the private school retains complete authority to choose and control the teacher, as well as most of the content of the class. And unlike shared time, there is no benefit for any public school student. Giving public money to aid private schools under these conditions violates the Parochiaid Amendment under *Traverse City*, both for aiding private schools specifically and for supporting their employment of teachers. 384 Mich at 413–416; see also *Council of Organizations and Others for Education about Parochiaid, Inc v.*

Governor, 455 Mich 557, 583 (1997) ("the common understanding of the voters in 1970 was that no monies would be spent to run a parochial school"); *In re Advisory of 1974 PA 242*, 394 Mich at 50 ("Proposal C clearly bars state support of a nonpublic school's general educational programs" in finding the provision of textbooks to the private schools as violating Michigan's constitution). Indeed, this Court directly warned about this in *Snyder v Charlotte Public School District*: "[I]f public schools can be required to satisfy in any way a parochial school's statutory responsibility to provide a core curriculum to its students, this might constitute impermissible direct aid to the parochial school[.]" 421 Mich 517, 540 (1984).

Public Act 249, by its terms, also reimburses a private school for maintaining basic quality standards in its core curriculum and teachers, again in contravention of *Traverse City*. The reimbursable mandates include the entire Private, Denominational, and Parochial Schools Act, under which "the courses of study" and "the qualifications of the teachers" in private schools must be "of the same standard as provided by the general school laws of this state." Exhibit B, Nonpublic Mandate Report, MCL 388.551. Public Act 249 would reimburse private schools for wages spent to meet this standard. MCL 388.1752b(1), (9). Money provided to a private school to comply with this mandate directly supports its general education program, as well as its employment of teachers, while at the same time ceding near-complete control over course and personnel decisions to the private school. Ironically, the Legislature appeared to recognize in the mandate itself that public funding for such purposes would be impermissible. MCL 388.557 ("Nothing in this act contained

shall be construed so as to permit any parochial, denominational, or private school to participate in the distribution of the primary school fund.").

In addition, multiple mandates for reimbursement under Public Act 249 relate to teacher certification, which inherently concerns the education and instruction of students. Exhibit B, Nonpublic Mandate Report, MCL 380.1233 (teacher certification and counseling requirements); MCL 380.1531–380.1538 (teacher certification requirements); R390-1145 (mentor teachers for noncertificated instructors); R390-1146 (teacher certification and counseling requirements). See *People v Bennett*, 442 Mich 316, 337, 340 (1993) ("state has an interest in seeing that all children within its borders are properly educated" and teacher certification is to ensure minimum qualifications of each teacher).

Under Public Act 249, private schools will apparently be reimbursed for the time teachers spend working toward statutory or administrative certification requirements, as well as the time certificated teachers spend mentoring non-certificated teachers. MCL 388.1752b(9). This is another scenario in which public money goes directly to a private school for education and personnel decision-making that the private school exclusively controls. It is precluded under *Traverse City*, both for impermissibly aiding the private school generally and for supporting the employment of persons at the private school. 384 Mich at 413–416. Like teaching government and maintaining quality standards of education, the reimbursements for mandates related to standards for teachers violates the Parochiaid Amendment in a straight-forward way under *Traverse City*. These provisions all must fall.

3. The remaining mandates also violate *Traverse City*'s control and direct funding prohibitions.

Public Act 249's remaining mandates, which largely involve health and safety or administrative matters, also violate *Traverse City*. It is worth repeating that while the Court distinguished auxiliary services, which it described as "educational services," from impermissible parochiaid on the ground that the former relate to "general health and safety measures" rather than "instruction," the Court continued to rely on the public school's control over such services in deciding their constitutionality: it expressly stated – without qualification – that the Parochiaid Amendment prohibits state funding of "educational services in the non-public school where the hiring and control is in the hands of the nonpublic school." *Traverse City*, 384 Mich at 418–420, 435. It also noted that auxiliary services are "performed by public employees" under "the exclusive direction of public authorities." *Id.* at 420.

But unlike the auxiliary services evaluated in *Traverse City*, under Public Act 249 the public school system does not dispatch public employees to perform a service. Instead, the Act singles out private schools and hands money directly to them to help them comply with their statutory mandates – some of which pertain to student safety and others relate to basic prerequisites to being in business – in whatever way that they, the private schools, see fit. Indeed, the statute directly helps pay the wages of private-school-chosen personnel with public money. This both impermissibly aids private schools by giving them, specifically, public money and control, and it impermissibly supports employment at the private schools. *Traverse City* bars these things.

B. If Public Act 249 is somehow permitted under *Traverse City*, the statute then is unconstitutional under the plain text of the Parochiaid Amendment, and *Traverse City* should be overruled.

This Court does not need to overrule *Traverse City* to hold Public Act 249 unconstitutional because the Act's appropriation of public money for private schools is prohibited under the reasoning of *Traverse City*. But should this Court disagree, *Traverse City* must be overruled to the extent it conflicts with the plain text of the Parochiaid Amendment.

1. *Traverse City* read exceptions into the Parochiaid Amendment that the plain text does not support.

The *Traverse City* Court analyzed whether the private school had control over hiring, curriculum, other decision-making, and the provision of services and whether public funds were given directly to private schools. *Traverse City*, 384 Mich at 413–416, 419–420. The decision also distinguished between administrative or health and safety services versus instructional purposes. *Id*. at 418–420. And in applying these distinctions, the Court relied on a distinction between incidental and non-incidental, or primary, aid. *Id*. at 413–416, 419–420; see also *Snyder,* 421 Mich at 530 n 4 ("the *Traverse City* Court stated that these aforementioned services are not educational in nature, but general health, safety, and welfare matters which have only an incidental relation to the instruction of nonpublic school students. In other words, these statutes do not involve courses of instruction or school enrollment, but merely services which the Legislature wished to extend to all children."). But the Parochiaid Amendment's prohibitions on state aid to private schools are not limited to "instruction" or to "non-incidental" effects.

Indeed, none of these distinctions or exceptions appear in the text of the Parochiaid Amendment itself. In fact, its prohibitory language could hardly be broader. It provides that "*[n]o* public monies or property" shall "be appropriated or paid," "or any public credit utilized," "by the legislature *or any other political subdivision or agency* of the state," "directly *or indirectly*" "to *aid* or *maintain*" any nonpublic school. Const 1963, art 8, § 2 (emphasis added). The ban is broad and sweeping.

The Amendment's plain text further provides that "*[n]o* payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property" shall be provided, "directly *or indirectly*," "to *support* the attendance of any student" "or the employment of any person" at a nonpublic school "or at any location or institution" where instruction is offered "in whole or in part" to nonpublic school students. Const 1963, art 8, § 2 (emphasis added).

Nowhere in this text did the People permit exceptions for when public money to aid a private school goes toward a "non-instructional," "health and safety," or "incidental" purpose, or for when the public body maintains some measure of control. On this point, the Amendment provides only *one* exception, which permits public funds to aid a nonpublic school or support attendance or employment: "The legislature may provide for the transportation of students to and from any school." Const 1963, art 8, § 2. This express exception further supports the point that no others are contemplated. See *Johnson v Recca,* 492 Mich 169, 176 n 4 (2012) (doctrine of *expressio unius*). Transportation alone was exempted from this broad bar.

Traverse City's various distinctions and exceptions also lack support in the text's context—that is, in the remainder of Article 8 that surrounds the Parochiaid Amendment. *Lapeer Cty Clerk v Lapeer Circuit Court*, 469 Mich 146, 155-156 (2003) ("[E]very provision must be interpreted in the light of the document as a whole[.]"). Though Article 8 of the constitution is titled "Education," the nine sections in that article are by no means limited to educational – as understood to be instructional – matters. *Contra Traverse City*, 384 Mich at 421 ("Since the employment stricture is a part of the educational article of the constitution, we construe it to mean employment for educational purposes only."). In fact, hardly *any* of them relate to education as instruction as contrasted with administrative matters. See Const 1963, art 8, §§ 1–9. To the contrary, the vast majority of Article 8 concerns administrative questions: Sections 3 through 7 address the makeup of governing boards; Section 8 encourages programs and services for those with disabilities; Section 9 provides for public libraries; and only Section 1 encourages education generally. Indeed, Section 2 itself – in which the Parochiaid Amendment resides – does not address instructional matters. Instead, it addresses how the State's school system is paid for and forbids discrimination. Const 1963, art 8, § 2.

Rather, the plain language of the Parochiaid Amendment was spelled out in common sense terms by Attorney General Frank Kelley, in whose opinion the distinctions about "incidental" effects and services that were not instructional played no role. See OAG, No. 4715, pp 185–187. The opinion applies the ordinary meaning of the Amendment's language in a straight-forward manner.

If the People of Michigan were asked today to cut off as much public funding to aid nonpublic schools as possible, it is difficult to imagine how they could do so more effectively than in the text of the Parochiaid Amendment. The import of the Amendment's plain text is clear: "[n]o public money 'to aid or maintain' a nonpublic school"; "[n]o public money 'to support the attendance of any student' at a nonpublic school"; and "[n]o public money to employ any one at a nonpublic school[.]" *Traverse City*, 384 Mich at 411. Because the plain meaning of the Parochiaid Amendment's text is clear, *Traverse City*'s interpretive gloss on it was neither necessary nor permitted. When interpreting the Constitution, this Court's task is "to give effect to the common understanding of the text" and "[w]ords must be given their ordinary meanings[.]" *Lapeer Cty Clerk*, 469 Mich at 155, 156; accord *County of Wayne v Hathcock,* 471 Mich 445, 468–469 (2004) ("This Court typically discerns the common understanding of constitutional text by applying each term's plain meaning at the time of ratification"). The meaning of the Parochiaid Amendment is plain here.

2. Public Act 249 does exactly what the Parochiaid Amendment prohibits: it appropriates money directly to aid nonpublic schools.

Public Act 249 does what the plain text of the Parochiaid Amendment forbids: it appropriates public money directly to aid nonpublic schools. The Legislature "appropriated" money from the general fund, specifically for nonpublic schools. Const 1963, art 8, § 2; MCL 388.1752b(1). The Department of Education – an "agency of the state," Const 1963, art 8, § 2 – then "pa[ys]" this public money to nonpublic schools. *Id.*; MCL 388.1752b(4). This violates the constitution.

a. Public Act 249 "aids" the private schools.

There is no question that the public money is "to aid" nonpublic schools. Const 1963, art 8, § 2. "Aid" is defined as "[t]o help; assist," or "[t]o give help or assistance to." *The American Heritage Dictionary of the English Language*, p 26 (1969). Reimbursing nonpublic schools specifically for their costs of complying with various state mandates "aids" those schools under any ordinary understanding of "aid," just as a parent's paying for a college student's books "aids" that student.

Indeed, while the Legislature attempted to disclaim any intent "to aid or maintain any nonpublic school," MCL 388.1752b(8), it could not help but acknowledge that Public Act 249's purpose and effect was to help nonpublic schools, and nonpublic schools specifically: "The funds appropriated under this section . . . are intended for the public purpose of ensuring the health, safety, and welfare of the children *in nonpublic schools* and *to reimburse nonpublic schools*[.]" MCL 388.1752b(7) (emphasis added).

b. Public Act 249 "maintains" the private schools.

Public Act 249's funds also "maintain" nonpublic schools. Const 1963, art 8, § 2. To "maintain" means "[t]o continue; carry on; keep up"; "[t]o preserve or retain"; "[t]o keep in a condition of good repair or efficiency"; or "[t]o provide for; bear the expenses of." *The American Heritage Dictionary of the English Language*, p 787 (1969). Several of the mandates eligible for reimbursement address basic maintenance activities. For example, schools must conduct and keep a record of fire drills. MCL 29.19. They must ensure that school buses meet federal motor safety

standards. MCL 257.1807–257.1873; MCL 257.715a. Play-ground equipment must be maintained in safe condition. MCL 408.686. Schools must keep proper documentation on students. MCL 380.1135; MCL 333.9208; MCL 380.1578. Teachers, counselors, and speech pathologists must be appropriately licensed. MCL 333.17609; MCL 380.1233; MCL 380.1531–380.1538; MCL 388.551; MCL 388.553; Rule 390.1145–390.1147. School buildings must be built to code and comply with federal asbestos regulation. MCL 388.851–388.855b; MCL 388.863. Schools must pay their employees the applicable minimum wage. MCL 408.411–408.424. These are all basic aspects of "maintaining" a school, and they relate to maintenance of the school's educational mission, maintenance of the school as a business, and maintenance of the basic health and safety of its occupants.

c. Public Act 249 "supports" the employment of teachers at private schools.

The mandates also "support" the employment of persons at nonpublic schools. Const 1963, art 8, § 2. To "support" is defined most relevantly here as "[t]o provide for or maintain by supplying with money or other necessities." *The American Heritage Dictionary of the English Language*, p 1293 (1969). By its express terms, Public Act 249 "suppl[ies] [nonpublic schools] with money" for employment by paying a portion of nonpublic employees' wages. *Id.*; MCL 388.1752b(9) (defining "actual cost" to be reimbursed as "the hourly wage of [the nonpublic school's] lowest-paid employee capable of performing the reported task").

d. Public Act 249 singles out private schools among other private businesses for state support.

In addition to "aid[ing]" and "maintain[ing]" nonpublic schools and "support[ing]" employment, all of which are constitutionally prohibited, Public Act 249 also contradicts the will of the People in a more subtle way: it singles out nonpublic schools for aid among other private businesses. To reiterate, the clear intent of the People in ratifying the Parochiaid Amendment, as expressed in its plain text, was to cut off public funding to aid private schools. Public Act 249 does just the opposite, and it also gives private schools special benefits that other private businesses do not receive. As is noted in the nonpublic mandate report, some of the mandates for which schools receive reimbursement have nothing to do with the school setting and are instead just basic building, employment, and environmental standards that apply to all businesses:

> As evidenced by examples, such as requirements regarding underground storage tanks and blood borne pathogen training, not all of these mandates are relevant based on the nonpublic school setting. They apply only because a school, as an institution, has to comply with laws regarding employment practices, environmental regulation, building codes, etc., *just as any other institution or place of business would*. [Exhibit B, Nonpublic Mandate Report, p 1 (emphasis added).]

But the State does not generally reimburse businesses for meeting these basic, state-mandated construction, employment, and environmental standards. Where the People have amended the Constitution specifically to place one particular entity beyond the reach of public funding, it is ironic that the Legislature has plucked that entity from among other businesses and given it public funds.

e. Public Act 249 provides for only a single exception – transportation – and no others.

The People provided *one* scenario under which the Legislature may appropriate money to aid or maintain, or to support attendance or employment at private schools: "The legislature may provide for the transportation of students to and from any school." Const 1963, art 8, § 2. The Parochiaid Amendment provides for no other exceptions, and the Court has no authority to establish additional ones.

It is important also to note that the above construction of the Amendment's plain text makes sense. It would not, for example, deprive nonpublic schools of general fire, police, water, electricity, sewage, and other community services. These public services are provided to aid *the community at large* and are not, in any ordinary sense, "directly or indirectly to aid any . . . *nonpublic* . . . *school*" or any other singular place of business. Const 1963, art 8, § 2 (emphasis added). See OAG, No. 4715, p 186 ("[Normal governmental services] as are normally provided to citizens such as fire protection, police protection, public sanitation and sewerage would not be affected by adoption of the proposed amendment[.]"). Indeed, to construe "indirectly" in the Parochiaid Amendment's first sentence so broadly would render the Amendment's second sentence superfluous. It would also call into question whether the State is seeking to close the private schools, including the religious ones. Cf. *Pierce v Society of Sisters,* 268 US 510 (1925) (state constitutional provision generally requiring attendance at only public schools unconstitutional). The Parochiaid Amendment does not require the exclusion of general community services that also benefit the private schools.

3. *Traverse City* mistakenly justified its non-textual construction because it erroneously believed that the plain text violated the federal constitution.

This Court in *Traverse City* engaged in this judicial construction of what otherwise is plain and clear language ("literal perspective") based on its conclusion that the Parochiaid Amendment's "mandate of no public funds for nonpublic schools would place the state in a position where it discriminates against the class of nonpublic school children in violation" of the federal constitution. *Id.* at 430; 432–433 ("The Attorney General's interpretation of Proposal C severely curtails the constitutional right of school selection while the state interests advanced by Proposal C do not require this intrusion upon the exercise of a fundamental constitutional right. Consequently, excluding private school children from receiving shared time instruction or auxiliary services at the public school is a denial of equal protection."). Not so.

As an initial matter, the Court's analysis conflated the opportunity for shared time and auxiliary services with the provision of ordinary governmental services that are unrelated to the private schools. On the latter point, *Traverse City* rightly concluded that the Amendment does not foreclose general services. *Id.* at 420 ("We do not read the prohibition against public expenditures to support the employment of persons at nonpublic schools to include policemen, firemen, nurses, counsellors and other persons engaged in governmental, health and general welfare activities."). The Attorney General had reached the same conclusion in his formal opinion. OAG, No. 4715, p 186. The Court agreed. *Traverse City,* 384 Mich at 420.

Otherwise, the Amendment might implicate the U.S. Supreme Court's analysis in *Everson v Board of Education*, where the Court noted that "parents might be reluctant to permit their children to attend [parochial] schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks." 330 US 1, 17–18 (1947). The Court noted that "cutting off church schools from these services . . . would make it far more difficult for the schools to operate." *Id*. But the Parochiaid Amendment does not bar general services. It bars state aid to the private schools.

Thus, contrary to *Traverse City,* the Parochiaid Amendment does not violate the federal constitution. There is no fundamental right to an education at a *state-funded* private school, nor is there a fundamental right to choose between a public school and a state-funded private school. None of the seminal cases about a parent's right to direct a child's education involved a positive right to enlist state aid for private schools. See *Pierce*, 268 US at 510 (identifying only fundamental right to send child to school of parent's choosing, provided nonpublic school meets state quality and curriculum standards, not right to state funding of nonpublic school); *Meyer v Nebraska*, 262 US 390 (1923) (overturning state law restricting foreign-language education); *Wisconsin v Yoder*, 406 US 205, 214 (1972) (overturning, as applied to Amish, state law that mandated compulsory school attendance until age 16).

The *Traverse City* Court also incorrectly concluded that denying private school students access to auxiliary services or shared time at public schools was a denial of equal protection and an unconstitutional burden on the free exercise of religion. *Traverse City,* 384 Mich at 433–434. The Court reasoned that the fact Michigan did not discriminate against religious schools, but imposed this limitation on all private schools, whether denominational or secular, see Const 1963, art 8, § 2, was not relevant because the "impact" was to impose a substantial burden on religious exercise. *Id.* at 434. But whether these were tenable conclusions in 1971, later federal decisions demonstrate that they were erroneous.

Denying reimbursement for basic business operation expenses of private schools does not violate the Free Exercise Clause. See *Locke v Davey*, 540 US 712, 720 (2004) (no violation of Free Exercise Clause by provision of state constitution that prohibited using scholarships for post-secondary education for a degree in pastoral ministry).[4] Nor does it violate the Equal Protection Clause. See, e.g., *Norwood v Harrison*, 413 US 455, 462 (1973) ("In *Pierce*, the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an

[4] Like the State of Washington's constitution at issue in *Locke*, Michigan also prohibits the use of public funds for education in a seminary. Const 1963, art 1, § 4 ("No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose.").

equal basis or otherwise. It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid."); *Trinity Lutheran Church of Columbia, Inc v Pauley*, 788 F3d 779, 783–785 (CA 8, 2015) (no violation of Equal Protection Clause for provision of state constitution that barred grant of public funds to church), petition granted, 136 S Ct 891 (2016).[5] As noted in *Everson,* the State could if it wished "provide transportation only to children attending public schools." 330 US at 16.[6]

Without addressing the wisdom of the Parochiaid Amendment, the decisions whether private school students should participate in shared time or receive auxiliary services are questions for the people of Michigan, not the Court. And in determining that Public Act 249 violates Michigan's constitution, such a policy that private institutions must pay their own business operation costs is by no means unusual in Michigan or the country generally.

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[5] The fact that the U.S. Supreme Court has granted leave in *Trinity Lutheran* does not bear on the issue here, as the Missouri constitutional provision at issue only excluded religious organizations, whereas Michigan's constitution does not discriminate between religious and non-religious schools.

[6] With regard to this constitutional analysis, the Court has stated in an earlier advisory opinion that it need not decide federal constitutional issues in the context of an advisory opinion regarding the state constitution. *In re Advisory Opinion re Constitutionality of 1974 PA 242*, 394 Mich 41, 47, 54 (1975) ("We therefore have no need to consider whether the challenged program unduly benefits or burdens religion but only whether it directly or indirectly aids or maintains a nonpublic school."). This reasoning is yet another reason to decline to review this question.

4. If this Court finds that Public Act 249 is constitutional under *Traverse City*, the principles of stare decisis favor overruling it to give effect to the will of the People.

To reiterate, this Court need not revisit *Traverse City* to hold Public Act 249 unconstitutional. But should this Court disagree, this Court should overrule *Traverse City* because it is inconsistent with the Parochiaid Amendment's plain text.

While stare decisis is "generally the preferred course," it "is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions." *Robinson v City of Detroit*, 462 Mich 439, 463 (2000). Stare decisis is a "principle of policy," rather than "an inexorable command," and this Court has a "duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question." *Id.* at 464.

The first question in deciding whether to give a prior decision stare decisis effect is "whether the earlier decision was wrongly decided." *Id.* at 465. As explained above, *Traverse City*'s reasoning conflicts with the plain text of the Parochiaid Amendment. This Court has on multiple occasions overruled precedent that "misconstrued a plainly worded statute." *Id.* at 465; see, e.g., *Rowland*, 477 Mich at 224 (Markman, J., concurring). The reason this Court has refused to let stare decisis shield decisions that misinterpreted a statute or the constitution is because enforcing the plain text of these provisions is vital to our democracy. A court that "distort[ed]" a statute or the constitution "was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism," i.e., "that the lawmaking power is reposed in the people," not the courts. *Robinson*, 462 Mich at 467. This alone is enough to justify overruling *Traverse City*.

The second question in deciding whether to give a prior decision stare decisis effect is whether overruling it would work an undue hardship on reliance interests. *Robinson*, 462 Mich at 465–466. But while overruling *Traverse City* to finally give effect to the Parochiaid Amendment would be disruptive, it would be no more disruptive than it would have been in 1970 when the Amendment was adopted. That is to say, any disruptive effect is due to the nature of the Amendment itself, not to reliance interests built up on precedent. The Parochiaid Amendment was *always* going to be a significant change – a fact that the *Traverse City* Court noted and balked at. 384 Mich at 411 n 3 ("Shared time has been an accepted fact of American life for more than forty years. . . . On the basis of historical analysis, therefore, it would require a strong showing that Proposal C really did inten[d] to outlaw shared time in the public schools because that had become a long accepted practice over a number of years."). While giving effect to the text of the Parochiaid Amendment might require changes in the relationship between the State's public and nonpublic schools, that is exactly the effect that the People intended.

What is more, a different kind of reliance interest is at issue when revisiting precedent that misconstrued the constitution's plain text. As this Court has said, "it is to the words of the statute itself that a citizen first looks for guidance in directing his actions." *Robinson,* 462 Mich at 467. That is "the essence of the rule of law: to know in advance what the rules of society are." *Id.* "In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest." *Id.*

When that happens, "a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction." *Id.* "[A]bsent a constitutional violation, the courts have no legitimacy in overruling or nullifying" the People's will as expressed in the Constitution. *Id.* If this Court concludes that Public Act 249 is constitutional based on the analysis in *Traverse City*, that flawed interpretation of the Parochiaid Amendment cannot stand as it would merely compound the error. See *Robinson,* 462 Mich at 460–461. It is this Court's responsibility to give effect to the words of the People. *Id.* at 468. To the extent *Traverse City* conflicts with those words in a way that allows Public Act 249 to be held constitutional, it should be overruled.

Nonetheless, the better course here is to strike down the statute under *Traverse City*. As a rule for interpreting the constitution, this Court only reaches constitutional questions where necessary to the disposition of the case under the constitutional avoidance doctrine. *People v Riley,* 465 Mich 442, 447 (2001). In a related way, this Court should only overturn established precedents – even ones that fail to follow the constitution's language in a significant way – where it is necessary for the resolution of the issue. Cf. *Anglers of the AuSable, Inc v Dep't of Environmental Equality,* 488 Mich 69, 134 (2010) (Young, J., dissenting) (opposing the overruling of precedent in part because the Court could have affirmed relief and upheld the case without doing so, arguing that that point alone "should have been persuasive to any jurist committed to stare decisis to avoid an unnecessary overruling of existing precedent"). The validity of *Traverse City* thus need not be reached.

CONCLUSION AND RELIEF REQUESTED

This Court should decline the Governor's request to issue an advisory opinion. But should it proceed with an opinion, it should hold that Public Act 249 is unconstitutional under the Parochiaid Amendment.

Respectfully submitted,

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